IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1836

COOPERS & LYBRAND,

Petitioner,

v.

CECIL LIVESAY and DOROTHY LIVESAY,

Respondents.

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, DR. RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,

v.

Petitioners,

CECIL LIVESAY and DOROTHY LIVESAY,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Questions Presented

(a) With Respect to All Petitioners

Does an immediate appeal lie from an order decertifying a class for alleged failure to prosecute where the Court of Appeals concluded that it would not be economically feasible for respondents to proceed on their individual claims, and where important rights of respondents and other class members would be irreparably lost absent an immediate appeal?

(b) With Respect to Petitioner Coopers & Lybrand

Did the Court of Appeals act within its authority in (a) ruling that the District Court had abused its discretion in decertifying the class for an alleged failure to prosecute when the delays in the litigation were actually caused by petitioners and by the District Court, and (b) remanding the case to the District Court for further proceedings consistent with the Circuit Court opinion?

Statement of the Case

(a) Proceedings to and Including Class Certification

In May 1972, petitioner Punta Gorda Isles, Inc. ("Punta Gorda") sold to the public approximately $18,088,000 worth of common stock and debentures pursuant to a Registration Statement and Prospectus ("the Prospectus"). Respondents Cecil Livesay (the Police Chief of Glendale, Missouri) and his wife, Dorothy Livesay, purchased securities at the offering in reliance upon the Prospectus, and even-

tually sustained a $2,650.00 loss on their investment.* (A 116-17) In July 1973, respondents—then represented by predecessor counsel—commenced this class action for damages resulting from purchases of such securities. The action was brought solely on behalf of persons who purchased on the offering itself, and the class was therefore limited to persons who purchased on May 2 and 3, 1972. (A 197)

The first amended complaint alleges that defendants violated various sections of the federal securities laws including Sections 11, 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. §§77k, 771(2), and 77q(a) and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b). (A 23)** Defendants include Punta Gorda (a Florida land development company), various individuals who were officers and directors of Punta Gorda, and Coopers & Lybrand ("Coopers"), the accounting firm which certified the financial statements in the Prospectus. (A 24-26)

Shortly after commencement of the action, respondents filed an amended complaint, interrogatories, and document production requests, and certain defendants served interrogatories on respondents. Answers, objections and re-

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* In its next Annual Report to Shareholders after the offering, Punta Gorda restated earnings reported in the Prospectus, writing down its 1970 net income by $1,039,700 (approximately two-thirds of 1970 net income), and writing down its 1971 income by $1,392,159 (approximately 40% of 1971 net income). (A 30)

** The first amended complaint alleges that the Prospectus was materially misleading, *inter alia*, in (a) failing to report results of operations and financial condition fairly and in accordance with generally accepted accounting principles and generally accepted auditing standards; and (b) failing to reveal the extent to which Punta Gorda's profitability had been and would be adversely affected by ecological regulation which impaired Punta Gorda's ability to develop canal front homesites. (A 28-35)

sponses were filed by all parties by mid-February 1974 and respondents noticed a deposition in March 1974. (A 1-5)

On April 11, 1974, respondents moved for an order determining that the action proceed as a class action. (A 85) Shortly thereafter, petitioners took respondents' depositions on all issues relating to class certification and to respondents' contentions on the merits. Extensive inquiry was made into the amount of respondents' loss, financial resources, anticipated expenses of the litigation, and intention to continue the litigation if class certification was denied. (*E.g.*, A 57-58, 60, 62-70, 72-75, 78-81)* Immediately upon conclusion of such depositions, Coopers moved to stay all discovery other than discovery relating to the class action determination. District Judge Wangelin granted Coopers' motion on May 14, 1974. (A 6, 86)

On May 20, 1974 Coopers moved to dismiss the class action allegations in the amended complaint (A 7), and the class motion was argued to the District Court on June 24, 1974. (A 87) Petitioners maintained that an evidentiary hearing should be held on the class issue but the District Court did not make such ruling.** Although on July 16, 1974, the District Court denied Coopers' motion to dismiss the class action allegations, respondents' application for class determination remained *sub judice.* (A 91-93) Faced with delay in the decision on the class motion, respondents filed a motion for dissolution of the stay on discovery on

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* See detailed discussion below, pp. 35-36.

** Judge Wangelin made no direction concerning an evidentiary hearing at the oral argument but indicated that he might provide a future direction in this regard, stating "my present thinking about the matter at this point" was that, "if I decide . . . [the question whether reliance is an individual issue affecting manageability] for you [*i.e.*, in favor of respondents] then I think we'll have a hearing." See Transcript, June 24, 1974, p. 37. However, Judge Wangelin did not order a hearing in his subsequent decision which rejected petitioners' arguments concerning reliance. (A 91-93)

September 4, 1974 which was denied on September 23, 1974. (A 96, 100)

Petitioners continued to seek an evidentiary hearing, and on September 26, 1974, respondents' counsel requested a conference with Judge Wangelin to discuss the need for such a hearing. (A 101) This request was respondents' second attempt to obtain direction from the District Court concerning the need for such a hearing. (See A 99)

A week later, Coopers moved for reconsideration of the District Court's July 16, 1974 order which had refused to dismiss the class action allegations. (A 94) Such motion was filed even though the class motion had been argued and continued *sub judice*, and despite the lack of any new developments in the case.

Thus, by early November 1974, the lawsuit was for all practical purposes stayed in its entirety without resolution of the class motion which had been argued five months earlier and without resolution of the evidentiary hearing question. Consequently, respondents filed a petition for a writ of mandamus on November 1, 1974 requesting the Eighth Circuit Court of Appeals to order Judge Wangelin to lift the stay on discovery. (A 103) On November 15, 1974, the Eighth Circuit denied the petition for a writ of mandamus, but directed that:

> ". . . petitioner [*i.e.*, respondents herein] should request a prompt ruling on its motion of April 9, 1974, for an order determining that a class action existed. If an evidentiary hearing is desired, that can likewise be requested. *The trial court should then promptly rule on petitioner's motion and remove its stay order and thereafter permit discovery to proceed on the merits,* postponing the actual trial date in order to permit necessary discovery.

"We are satisfied that the trial court will act in compliance with the views of this Court, and, therefore, we now deny the petition for writ of mandamus." (emphasis added). (A 107-08)

As a result of the Eighth Circuit's Order, an evidentiary hearing on the class motion was held on December 30, 1974. At that hearing testimony was presented concerning the extent of respondents' loss, financial position, anticipated litigation expenses, and their intention to pursue the litigation if class status was denied. (*E.g.*, A 117, 119-21, 125-26, 128-145)* At the conclusion of the evidentiary hearing, District Judge Wangelin stated that an immediate appeal would be appropriate if he refused to certify the class:

"I'm sure you've all heard of the quote Death Knell Doctrine, and assuming, without deciding, that I rule against a class action, I think the record should be in such shape that plaintiffs could 1291 it, and go up to the Eighth Circuit and get an opinion. . . ." (A 166)

Notwithstanding the Eighth Circuit's instruction that the class motion be decided promptly, the District Court did not decide the class motion until June 19, 1975 (A 168-172) —approximately one year after it was argued and seven months after the Eighth Circuit urged a prompt decision. Judge Wangelin's opinion certifying the class expressly found that plaintiffs were adequate representatives of the class, that "common questions clearly predominate in this lawsuit", and that "this action may be maintained as a class [sic] pursuant to Rule 23. . . ." (A 169-70). Judge Wangelin also held, however, that new counsel was required for the class representatives because their existing counsel had a

* See detailed discussion below, pp. 35-36.

possible conflict of interest in his continuing relationship with one of Punta Gorda's underwriters.* (A 170-72).

(b) Proceedings Subsequent to Class Certification

Respondents' original counsel voluntarily withdrew from the action, and their present counsel appeared on June 30, 1975. (A 12) In subsequent proceedings there developed a pattern of District Court acquiescence in repeated requests by petitioners for reconsideration of prior decisions and for delay in implementing the Eighth Circuit's mandate to lift the stay on discovery. In addition, the District Court improperly directed respondents to name additional defendants and rendered further decisions which had as a practical effect the failure of this action to move beyond questions of class certification and into discovery on the merits.

Consistent with the prior direction of the Eighth Circuit, respondents again moved to dissolve the stay on discovery on July 25, 1975. (A 175) Coopers opposed such motion and

* The Prospectus listed the underwriter involved—I.M. Simon & Co.—as one of the 51 firms in the underwriting syndicate; the seller of $125,000 principal amount of debentures out of a total of $15 million of debentures being offered; and the seller of 1,500 shares of stock out of a total of 171,570 shares being offered. The record indicates that since 1969 respondents' predecessor counsel had performed certain legal services for I.M. Simon & Co. on matters unrelated to this litigation. (A 153-54) The record also indicates that Coopers' counsel, Bryan Cave McPheeters & McRoberts, also represented I.M. Simon & Co. during the same period on various matters. (A 153-54) In addition, Punta Gorda's present counsel, Peper Martin Jensen Maichel and Hetlage, represented the underwriters including I.M. Simon & Co. (not Punta Gorda) in connection with the very offering at issue in this litigation. (See A 182) Despite such special access to information concerning the responsibility of the underwriters, counsel for petitioners failed to assert any third party claims for contribution or indemnification against the underwriters, but instead argued that respondents were inadequate class representatives for failing to sue petitioners' attorneys' own clients.

sought still further reconsideration of class issues, requesting a statement from counsel concerning their intent to join underwriters as additional defendants, and seeking reconsideration of questions already decided concerning the adequacy of respondents as class representatives.* (See A 178-180).

In reply, respondents stated their intention not to name additional defendants. Respondents stressed that the class would not be prejudiced thereby, since the instant defendants had sufficient means to satisfy any judgment obtained against them and were in counsel's opinion those persons and entities primarily liable for the damages sustained by the class. Moreover, the underwriters could be required to provide relevant discovery even if they were not joined as defendants. Respondents also indicated concern that such joinder might not be timely since this action had been pending since 1973. (A 183)

On October 23, 1975, the District Court denied respondents' motion to lift the stay on substantive discovery on the ground that respondents had failed to join the underwriters. The District Court ordered respondents to join such additional parties subject to reconsideration by the

* Coopers sought to reopen the question of the willingness of Chief and Mrs. Livesay to vigorously prosecute the action and to meet their financial responsibilities as class representatives despite Judge Wangelin's express ruling subsequent to an evidentiary hearing and extensive briefing of such issues that respondents would be adequate representatives. Coopers also questioned the background and experience of respondents' new counsel (Milberg & Weiss) despite the fact that the firm had been appointed lead or general counsel in numerous securities class actions (See A 181-82) and that Melvyn I. Weiss, the partner in charge of this litigation, was then scheduled to serve, together with two representatives of Coopers, as a faculty member of a Practicing Law Institute Seminar on "Accountants' Liability: Law and Litigation" to be held in Los Angeles and New York City in October 1975. (See A 182) Raising such issues served no purpose except to delay the litigation.

Court if respondents sought an *in camera* conference. (A 186-190). Judge Wangelin did not in that opinion decertify the action as a class action, but instructed that a form of notice of pendency of class action be prepared which would invite class members to petition for appointment as new class representatives. (A 188) Judge Wangelin also held that he would not decide which issues were suitable for class action treatment until the expiration of the period of time given in the notice for class members to opt out or enter an appearance so as to provide "any class member who may appear an opportunity to be involved in this determination." (A 189)

On November 4, 1975 a conference was held for the purpose of further considering respondents' reasons for not joining the underwirters.* At such conference, respondents reiterated the reasons described above and advised the Court of their opinion that any claims against underwriters had been barred by the statutes of limitations prior to the date upon which present counsel appeared. Despite such representations, Judge Wangelin persisted in his decision to distribute the form of class notice outlined in his October 23, 1975 decision. (A 194-199).

In such decision, Judge Wangelin had directed that proposed forms of notice of pendency be submitted to him within thirty days. (A 190) In an effort to expedite this process, counsel for respondents agreed upon a joint form of notice with counsel for Punta Gorda.** Proposed notices of pendency were submitted to Judge Wangelin in November 1975 (A 14). Judge Wangelin did not mail his proposed notice of pendency to counsel until March 1, 1976. (A 193) On April 9, 1976, the District Court mailed to all counsel the final form of notice of pendency (A 194-199), which

* No transcript was made of that conference.

** Counsel for Coopers refused to participate in a joint notice and submitted their own proposal.

form contained certain provisions to which respondents had previously objected. (A 212-214) Such provisions included a statement that no particular questions would be certified for class treatment until after the deadline expired for opting out or intervening. (A 197)

On October 23, 1975, when requesting forms of notice of pendency, Judge Wangelin had lifted the stay upon discovery only to permit discovery of class members' names and addresses. (A 189) In accordance with prior practice respondents had planned to notify the class by sending first class mail to persons who were record owners of the relevant securities. Long before the October 23, 1975 order respondents had arranged to obtain such information informally through the cooperation of Punta Gorda's counsel. (See A 176-177) The notification procedure anticipated had been utilized widely in securities class actions, and review of transfer records with the cooperation of defendants had been and remains a standard practice for identifying recipients of the notice. (See discussion below on p. 58, n.**) Indeed on September 7, 1977 Judge Wangelin himself approved precisely such a procedure for identifying and providing notice to the class members.*

On April 20, 1976, promptly after receiving the final form of notice of pendency, respondents asked counsel for Punta Gorda to furnish the names and addresses of the initial registered owners (after the underwriters) of the relevant securities pursuant to respondents' prior understanding that such information would be provided. Punta Gorda replied by letter dated April 21, 1976 (A 215-216) that it could not produce the relevant addresses because such addresses were in the possession of Punta Gorda's transfer agent. Such a reply can only be considered a delaying tactic, since Punta Gorda, as principal, had the authority

* Judge Wangelin's September 7, 1977 Order is set forth as Appendix A hereto.

to direct its transfer agent to produce the requested documents.* Punta Gorda's counsel also indicated an unwillingness to furnish transfer records on the ground that certain record owners might not be beneficial owners or class members (A 215-216), thus ignoring the fact that under *any* notice program review of the transfer records is a necessary and standard practice.

Faced with Punta Gorda's continuing refusal to produce the necessary transfer records, respondents in early July sought a conference with Judge Wangelin to resolve the issue. The conference was held on July 26, 1976. To assure that the record reflected respondents' outstanding discovery requests, respondents served on Punta Gorda their Second Request for Production of Documents, which formally requested the types of documents already requested and refused. (A 200) At the July 26, 1976 conference, Judge Wangelin directed respondents to serve papers in support of such production request** and respondents' memorandum in support of such request was filed on August 8, 1976. (A 15) The propriety of respondents' document production request, respondents' proposed method of notice, and Punta Gorda's objections*** had not yet been decided by Judge Wangelin when on September 1, 1976 he decertified the action as a class action. (A 15-16)

* A representative of the transfer agent for Punta Gorda stock had testified at the evidentiary hearing on the class motion that the transfer agent could only produce such information at the direction of Punta Gorda. (A 112)

** See Transcript of Conference in Chambers, July 26, 1976, pp. 22-24.

*** Punta Gorda's Brief is incorrect in stating that Punta Gorda never objected to producing the transfer records of the initial registered owners but only to producing such records without payment. Punta Gorda Brief, pp. 10-13, n.3, In fact, Punta Gorda filed formal objections to respondents' document production request which expressly refused to provide transfer records on the ground that "such documents are not in defendants' custody" and that respondents should obtain such documents "from the appropriate persons." (A 205-206)

(c) District Court Decertification of This Action as a Class Action

Not until respondents sought Court assistance in compelling production of the relevant transfer records did Coopers serve its motion to decertify the class. (A 201) In accord with past practice by petitioners, Coopers' motion relied heavily on arguments against class status previously raised by petitioners and previously rejected by Judge Wangelin.*

In contrast to the substantial periods of time required for determination of the class motion and form of notice of pendency, Judge Wangelin ruled promptly on Coopers' motion and decertified the class on September 1, 1976. (A 207) In his Memorandum decertifying the class, Judge Wangelin relied solely on alleged undue delay by respondents as a basis for decertification, and characterized the motion as follows:

> "The basis of the various defendants' motion is that the plaintiffs, as class representatives, are failing to prosecute this action, and are therefore denying the defendants a right to a speedy adjudication of the claims against them." (Pet. Cert., p. A-7).**

* Such grounds included an alleged unreasonable delay by respondents' former counsel in filing the class motion and seeking an evidentiary hearing, failure to sue the underwriters, and an alleged lack of manageability of the case as a class action (A 201-204. See A 167; Coopers Suggestions in Support of Defendant's Motions, filed August 20, 1975; Post Hearing Memorandum of Coopers in Opposition to Plaintiffs' Motion for a Determination that this Action may Proceed as a Class Action, filed April 10, 1975). The one new ground raised by Coopers was an alleged unreasonable delay by respondents in seeking to identify the names and addresses of class members. (A 202-203)

** References to "Pet. Cert." are to pages of the Appendix to the Petition for Certiorari of Punta Gorda, et al.

Judge Wangelin further remarked:

> "The defendants are merely seeking, as is their right, to have a speedy adjudication of the claims against them." (Pet. Cert., p. A-8)

Not until Judge Wangelin decertified the class did he lift the stay on substantive discovery. (A 207) Prior to the decertification motion, respondents' present counsel had unsuccessfully attempted to persuade the District Court to lift the stay in applications filed on July 25, 1975 and on November 26, 1975. (A 175, 191-192) Respondents' last attempt to lift the stay was in a cross-motion to Coopers' motion to decertify on August 16, 1976. (A 15)

Subsequent to the Eighth Circuit's reversal of the decertification order, respondents' efforts to move the action forward on the merits have again been blocked by the District Court. On December 7, 1977, the District Court *on its own motion* stayed all further proceedings and motion practice pending determination of the issues before this Court.* Among the motions which will not be decided until such stay is lifted is respondents' motion (served August 9, 1977) to compel production of documents and interrogatory answers from petitioners. Until that motion is decided, Coopers will have successfully avoided producing even one scrap of paper in this litigation despite persistent efforts by respondents to obtain discovery during a period of over four years.

(d) Disposition on Appeal

Respondents sought relief in the Court of Appeals both by appeal (A 208) and by filing a Petition for a Writ of

* Judge Wangelin's December 7, 1977 Order is annexed hereto as Appendix B.

Mandamus. Respondents predicated their right to an immediate appeal on the "death knell" and "collateral order" doctrines and on the interpretation of 28 U.S.C. § 1291 set forth in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-54 (1964).

The Eighth Circuit held unanimously that it had jurisdiction to review the decertification decision under 28 U.S.C. §1291 because the decertification sounded the "death knell" of the action; reversed the decertification order as an abuse of discretion; and dismissed the mandamus petition as moot. (Pet. Cert., pp. A-10 through A-21; 550 F.2d at 1106-13) Application of the death knell doctrine was based on the extensive material in the record concerning the size of respondents' loss, respondents' financial condition, and anticipated costs and expenses of the litigation. The Court noted that extensive discovery in Florida would be required and that utilization of expert testimony was indicated. (Pet. Cert., p. A-13 through A-16; 550 F.2d at 1109-10)

On the merits, the Court of Appeals carefully analyzed the three periods of alleged delay upon which the decertification order was based, and unanimously concluded that Judge Wangelin's finding of undue delay by respondents was "wholly unsupported by the record." (Pet. Cert., p. A-16 through A-20; 550 F.2d at 1110-1112) To the contrary, the Eighth Circuit concluded that the undue delay in the case was in large part caused by defendants and was also attributable to the District Court. (Pet. Cert., p. A-19 to A-20; 550 F.2d at 1112)

In consequence, the Court of Appeals reversed the order decertifying the class, and remanded the case "for further proceedings consistent herewith". (Pet. Cert., p. A-21; 550 F.2d at 1113)

Summary of Argument

The death knell doctrine is fully consistent with this Court's "intensely practical" interpretation of the final decision rule—an approach designed to assure that technical notions of finality do not effectively deprive litigants of their right to appeal important issues. Respondents cannot proceed absent an immediate appeal because an action based on their individual claim would be economically impracticable. Lack of economic viability is a proper reason for treating denial of class status as a final decision, since the drafters of Rule 23(b)(3) of the Federal Rules of Civil Procedure recognized that economic realities would prevent small claim-holders from bringing suit on their individual claims unless the suit could be brought as a class action. Absent the right of immediate appeal, respondents would be required to proceed regardless of the economic viability of their individual claim. If Respondents do not proceed, they would be subject to dismissal for lack of prosecution and would apparently be precluded from raising the class issue on an appeal from such a dismissal.

The record in the District Court strongly supports the Eighth Circuit's finding that respondents could not proceed on their individual claim, and that no other class members have appeared for the purpose of continuing the litigation.

Rejection of the death knell doctrine would conflict with the purposes of the final decision rule and Rule 23 by fostering multiplicity of litigation and piecemeal appeals. Such evils would result from encouraging intervention by absent class members (who may after intervening settle their individual claims and not seek class relief, thereby creating a need for new intervenors to protect the class) or from commencement of new actions in other jurisdictions.

Rejecting the death knell doctrine would also have the undersirable effect of facilitating "one way intervention."

The version of the death knell doctrine enunciated in *Hooley* v. *Red Carpet Corp.*, 549 F.2d 643 (9th Cir. 1977) would also produce multiplicity of litigation, since it entails efforts to encourage intervention. The *Hooley* approach also suffers from the difficulty of identifying claims which are large enough to be viable in light of the enormous expenses required to litigate a substantial claim under the federal securities laws against large and well financed entities. Such approach would greatly complicate the litigation by requiring extensive discovery and, perhaps, dissemination of special notices to absent class members.

The death knell doctrine does not discriminate against class action defendants. Whereas respondents will have no opportunity to appeal at a later date because they cannot proceed on their individual claim, petitioners can appeal from a grant of class status after a final judgment on the merits. Petitioners' argument in this regard is really a part of their argument that class actions are unfair to defendants because of an alleged *in terrorem* effect. Such argument is unsupported by the actual experience with class actions and by the record herein. It also ignores the significant *in terrorem* effect exerted on small claim-holders by the ability of large defendants in class actions to devote extensive resources to the defense of claims brought against them.

Respondents' right to an immediate appeal is supported by the collateral order doctrine, since the order below was a final determination of respondents' right to serve as class representatives, review of the merits was unnecessary on appeal, and class members will be denied important rights irretrievably absent an immediate appeal. Lack of an immediate appeal would force class members

who would prefer to exercise their right under Rule 23 to remain passive, to intervene after decertification to protect their individual claims against the running of the statute of limitations. Furthermore, absent class members may have no standing to raise the class issue on a later appeal if respondents were to settle their individual claim prior to any determination of the merits while the action was decertified.

In light of the fundamental importance of the class issue in this litigation and the District Court's statement that an immediate appeal would be appropriate if it denied class certification, the Eighth Circuit also had jurisdiction to hear the appeal under *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964).

Limiting the opportunity for an immediate appeal to the procedure set forth in 28 U.S.C. §1292(b) would be inappropriate. Such a rule would subject respondents' appeal to a double layer of judicial discretion when the appeal should be as of right.

If the Court should rule that the Eighth Circuit had no jurisdiction to hear the appeal, respondents request that the Court remand the case to the Eighth Circuit for consideration of respondents' mandamus petition which the Eighth Circuit dismissed as moot on granting appellate relief.

The Eighth Circuit correctly held that decertification for failure to prosecute was "wholly unsupported by the record." The District Court based its order on plainly erroneous findings of fact concerning respondents' activities while totally ignoring petitioners' persistent efforts to delay, the District Court's own acquiescence in such efforts, and the District Court's own delays in resolving important issues.

The Eighth Circuit did not interfere with District Court discretion by reversing the order below and remanding for further proceedings consistent with its opinion. Since the District Court had previously certified the class, the effect of the Eighth Circuit's decision was not to certify a class in the first instance or to interfere with District Court discretion, but only to reestablish the class which had been earlier certified by the District Court.

Finally, Coopers' argument that the class should be decertified for reasons other than those cited by Judge Wangelin is ill founded. The contention that the class was injured by respondents' failure to sue underwriters has no support in the record and is inconsistent with petitioners' own failure to implead the underwriters. The argument that common issues do not predominate and that the case is unmanageable as a class action is untenable in light of the numerous cases certified as class actions where the class period was far longer in duration than the two day class period involved here and where many more misleading documents were involved than the one Prospectus involved in this action.

ARGUMENT

I

The Court of Appeals Had Jurisdiction to Consider Respondents' Appeal From the Order Decertifying the Class.

1. This Court Has Stressed a Practical Interpretation of 28 U.S.C. §1291 Aimed at Avoiding Piecemeal Appeals, Achieving Economy of Litigation, and Protecting Substantial Rights of Litigants

28 U.S.C. §1291 provides in relevant part as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ..."

This Court has repeatedly recognized and implemented Justice Jackson's statement that:

> "it is a final *decision* that Congress has made reviewable. 28 U.S.C. §1291. 28 U.S.C.A. §1291. While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Stack* v. *Boyle,* 342 U.S. 1, 12 (1951) (separate opinion) (emphasis in original), cited in *Abney* v. *United States,* 431 U.S. 651, 658 (1977).

While the "final decision" rule is aimed at achieving economy of litigation and avoidance of piecemeal appeals,* this Court has often emphasized that the finality requirement must be given a practical rather than a technical construction. *E.g., Abney* v. *United States, supra,* 431 U.S. at 658; *Eisen* v. *Carlisle & Jacquelin* (*"Eisen IV"*), 417 U.S. 156, 170-71 (1974); *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949).

Justice Frankfurter has stressed that the final decision rule "is not a technical concept of temporal or physical termination," but is "the means for achieving a healthy legal system" by preventing appeals which cause courts "'to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation. . . .'" *Cobbledick* v. *United States, supra,* 309 U.S. at 326, citing *Segurola* v. *United States,* 275 U.S. 106, 112 (1927). In the same opinion, Justice Frankfurter also emphasized the importance of not making the doctrine of finality a means of denying any appellate re-

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* *E.g., Catlin* v. *United States,* 324 U.S. 229, 233-34 (1945); *Cobbledick* v. *United States,* 309 U.S. 323, 324-26 (1940); 9 Moore, *Federal Practice* ¶110.07, pp. 107-09 (2d ed. 1975). See Crick, *The Final Judgment as a Basis for Appeal,* 41 Yale L.J. 539, 540, 550-51 (1932).

view on an issue of critical importance to the litigation. 309 U.S. at 328-29.

This Court's "intensely 'practical' "* approach to finality is reflected in various categories of cases where appeals are allowed despite the lack of a final judgment terminating the entire litigation. Thus, a decision may be final when it effectively denies a litigant his day in Court by making further litigation economically impracticable. *Roberts* v. *United States District Court,* 339 U.S. 844 (1950) (denial of application to proceed *in forma pauperis*) (see discussion below, p. 24). The "collateral order doctrine" is applied to prevent effective loss of the right to appeal from important decisions which do not terminate the entire litigation and which do not involve consideration of the merits. *E.g., Swift & Company Packers* v. *Compania Colombiana del Caribe,* 339 U.S. 684 (1950); *Cohen* v. *Beneficial Industrial Loan Corp., supra.*

The Court has also recognized that the goal of economy of litigation may *require* in certain situations an immediate appeal from a decision which neither terminates the litigation nor is totally unsusceptible to review at a later time. *E.g., United States* v. *Nixon,* 418 U.S. 683, 692 (1974) (protracted litigation avoided by not requiring citation for contempt as basis for appeal); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306-308 (1962) (issues still to be litigated sufficiently independent of the critical issues already resolved to make immediate review appropriate).**

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* *Mathews* v. *Eldridge,* 424 U.S. 319, 331 n.11 (1976).

** This Court has also applied such considerations in taking jurisdiction of appeals from state court litigation under 28 U.S.C. §1257 at a time when substantial additional proceedings are pending in the state courts and the federal issue could in fact be appealed at a later date. See discussion in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477-81 (1975); *Mills* v. *Alabama,* 384 U.S. 214, 217-18 (1966).

The above-cited interpretations of the final decision rule strongly support the conclusion that an immediate appeal from an order denying class status is proper if the plaintiff is a small claim-holder who for economic reasons cannot proceed on his individual claim unless the case is a class action. As shown below, denial of a right to appeal herein would conflict with the purposes of the final decision rule by denying litigants like respondents any meaningful appellate review of their right to prosecute their individual claims and by increasing rather than decreasing the likelihood of multiplicity of litigation and piecemeal appeals.

2. The Death Knell Doctrine Was a Proper Basis For Appellate Jurisdiction Under 28 U.S.C. §1291

(a) *The Death Knell Doctrine Is Fully Consistent With the Purposes of the Final Decision Rule*

The Eighth Circuit based its jurisdiction on the death knell doctrine (Pet. Cert., pp. A-13 through A-16; 550 F.2d at 1109-10), under which doctrine various courts of appeals have recognized the right to an immediate appeal from a denial of class status when the named plaintiff's claim is so small as to render continued prosecution of the claim impracticable. *E.g., Ott* v. *Speedwriting Publishing Co.,* 518 F.2d 1143, 1146-49 (6th Cir. 1975); *Williams* v. *Mumford,* 511 F.2d 363, 366-67 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975); *Graci* v. *United States,* 472 F.2d 124, 126 (5th Cir.), *cert. denied,* 412 U.S. 928 (1973); *Eisen* v. *Carlisle & Jacquelin ("Eisen I"),* 370 F.2d 119, 120-21 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967).*

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* The Seventh and Third Circuits have rejected the death knell doctrine and limited the possibility of an immediate appeal from denial of class status where no injunction is sought to situations where the plaintiff obtains a District Court certification of an appeal under 28 U.S.C. §1292(b). *E.g. Anschul* v. *Sitmar Cruises, Inc.,* 544 F.2d 1364, 1366-69 (7th Cir.) *cert. denied,* 429 U.S. 907 (1976); *Katz* v. *Carte Blanche Corp.,* 496 F.2d 747, 752-56 (3rd

The death knell doctrine is not an exception to the final decision rule. It is rather a proper and necessary application of that rule in a situation where court proceedings are in fact at an end absent an immediate appeal despite the lack of a final judgment. Thus, in the opinion which first formulated the death knell doctrine, the Second Circuit recognized that plaintiff's claims would "never be adjudicated" unless an immediate appeal from denial of class status was allowed. *Eisen I*, 370 F.2d at 120. See also, Note, *Appealability of Class Action Dismissal: The "Death Knell" Doctrine*, 39 U.Chi.L.Rev. 403, 406 (1972).

Petitioners argue that the Third and Seventh Circuit approaches are correct because in their view economic inability to proceed cannot render the decertification a final decision (Coopers' Brief, pp. 21-22). Such an argument ignores the fact that a major purpose of the framers of Rule 23(b)(3) of the Federal Rules of Civil Procedure was to open the courts to small claimants who could not afford to bring suit on an individual basis. *E.g., Eisen* v. *Carlisle & Jacquelin* (*"Eisen II"*), 391 F.2d 555, 560 (2d Cir. 1968); *Advisory Committee's Note to Proposed Rule 23 of Rules of Civil Procedure*, 39 F.R.D. 98, 104 (1966) ("the amounts at stake for individuals may be so small that separate suits would be impracticable"); Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Comm. L. Rev. 497 (1969);* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*,

Cir.) (*en banc*), *cert. denied*, 419 U.S. 885 (1974). The Ninth Circuit has adopted a special version of the death knell doctrine in which the plaintiff must show that "it is highly unlikely that *any* member of the purported class has a claim justifying separate litigation." *Hooley* v. *Red Carpet Corp.*, 549 F.2d 643, 645 (9th Cir. 1977) (emphasis added).

* Justice (then Professor) Kaplan was the Reporter to the Advisory Committee during the 1966 revision of Rule 23.

81 Harv.L.Rev. 356, 397-98 (1967).* Stripping a small claim-holder of the right to bring a class action is thus a final decision on his individual claim since implicit in the enactment of Rule 23(b)(3) is the recognition that, but for the right to proceed in a class action, the small claim-holder cannot proceed at all. As this Court noted in *Eisen IV*, *supra*, 417 U.S. at 161:

> "A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. *Economic reality dictates that petitioner's suit proceed as a class action or not at all.*" (emphasis added)**

The Second Circuit has regarded the death knell doctrine as one specific application of the collateral order doctrine. *E.g., Eisen I*, 370 F.2d 120-21. The death knell doctrine does in fact meet all the requirements of the collateral order doctrine, since the order below finally determines an important claim of right, review of which does not involve the merits of the action, in a context where denial of an

* Earlier expressions of concern over the plight of small claim holders which influenced the development of Rule 23 are set forth in Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L.Rev. 433, 434-5 (1960); and Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U.Chi.L.Rev. 684, 684-86 (1941). Judge Frankel has recognized that the views of the Advisory Committee on Civil Rules with respect to Rule 23 were "strongly influenced" by the above article by Judge Weinstein. Frankel, *Amended Rule 23 from a Judge's Point of View*, 32 A.B.A. Antitrust L.J. 295, 298 (1966).

** This Court affirmed appellate jurisdiction in *Eisen IV* on the ground that an order concerning the allocation of the cost of a class notice came within the collateral order doctrine. In consequence it was unnecessary for this Court to consider whether the death knell doctrine was also a proper basis for appeal. 417 U.S. at 169-72.

immediate appeal is tantamount to denial of any appeal. See *Cohen* v. *Beneficial Industrial Loan Corp., supra.*•

In *Roberts* v. *United States District Court, supra,* this Court applied a similar analysis and cited *Cohen* v. *Beneficial Industrial Loan Corp., supra,* in holding that "the denial by a District Judge of a motion to proceed *in forma pauperis* is an appealable order." 339 U.S. at 845. *Roberts* has generally been interpreted to be based on the litigant's right to appeal from an order which makes it economically impracticable for him to proceed. *E.g., Trustees of Joint Welfare Fund* v. *Nolan,* 549 F.2d 871, 873 (2d Cir. 1977); *Flowers* v. *Turbine Support Division,* 507 F.2d 1242, 1244 (5th Cir. 1975); *Spires* v. *Bottorff,* 317 F.2d 273 (7th Cir. 1963), *cert. denied,* 379 U.S. 938 (1964).••

Coopers also errs in arguing that the decertification order cannot be a final decision because Rule 23(c)(1) provides that "an order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." The decision that respondents were inadequate class representatives because of an alleged failure to prosecute is not conditional, since it is not predicated on facts which can change during the further course of the litigation.

• Respondents submit that the requirements of Section 1291 are met herein without regard to whether the death knell doctrine falls within the collateral order doctrine or is a "distinct but compatible" test for appealability. See discussion in *Share* v. *Air Properties G. Inc.,* 538 F.2d 279, 281 (9th Cir.), *cert. denied,* 429 U. S. 923 (1976).

•• See also discussion by Judge Rosenn, dissenting, in *Hackett* v. *General Host Corp.,* 455 F.2d 618, 627, 630-31 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972). Professor Moore regards the decision in *Roberts* as

> "justifiable quite apart from the *Cohen* rationale. Unlike the order in *Cohen,* such orders effectively end, not simply a collateral claim, but the whole claim or right asserted." 9 Moore, *Federal Practice,* ¶110.10, p. 134 (2d ed. 1975).

Unless respondents are entitled to an immediate appeal from a denial of class status, they would apparently be required to proceed in the District Court on an individual basis regardless of the economic viability of the law suit. If they fail to proceed they risk being dismissed for lack of prosecution and may lose any right to raise the propriety of the denial of class status on appeal from such dismissal. See, *Eisen I, supra,* 370 F.2d at 120.• See also, *Marshall* v. *Sielaff,* 492 F.2d 917, 919 (3d Cir. 1974).••

Furthermore, rejection of the death knell doctrine would enhance rather than reduce the likelihood of piecemeal appeals. If respondents' claims are dismissed for lack of prosecution and some other class member intervenes for the purpose of appealing the class denial, the likelihood is

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• Coopers cites *United States* v. *Procter & Gamble Co.,* 356 U.S. 677 (1958) and *Thomsen* v. *Cayser,* 243 U.S. 66 (1917) incorrectly for "the proposition that the named class representative himself may convert an adverse interlocutory class certification order into an appealable final judgment if he voluntarily dismisses his individual action under Rule 41(a)." Coopers' Brief, p. 30 n.20. In both actions the dismissal of the case was a discretionary act by a District Court which converted an application for a voluntary dismissal into an involuntary one, thereby according the plaintiff an immediate appeal. Dependence upon District Court discretion in this regard is an insufficient substitute for a plaintiff's right to appeal under 28 U.S.C. §1291 if the denial of class certification is in fact a final decision effectively terminating the litigation. The opinions in the two cases cited by Coopers reveal that such dismissals are not appealable if they are regarded as voluntary dismissals under Rule 41(a), but only if the Court of Appeals is willing to regard them as involuntary because of their connection with an adverse result sustained by appellants in the District Court. See 356 U.S. at 680-81; 243 U.S. at 83.

•• In *Marshall* v. *Sielaff, supra,* plaintiff refused to proceed to trial because the Court would not issue a writ of habeas corpus *ad testificandum.* The Third Circuit affirmed the resulting dismissal for failure to prosecute and refused to consider whether the District Court's failure to issue the writ was error. The Third Circuit stressed that considering such issue would allow plaintiff to convert an interlocutory order into a final decision by improperly refusing to prosecute his claim.

that there will be no District Court record of any substance as to the adequacy of the intervenor as a class representative. In consequence, the Court of Appeals may have to remand the case for specific findings on the adequacy of the new class champion,* leaving open the possibility that class status may again be denied and requiring still another appeal for resolution. In addition, other class members may institute law suits in various courts, giving rise to the prospect of numerous appeals in different jurisdictions.

On the other hand, multiple death knell appeals in the same action are not a likely result of adopting the death knell doctrine. Where intervention does not occur, "Experience teaches that it would be a rare case when the specter of multiple appeals in the same case became a reality" (*Anschul* v. *Sitmar Cruises, Inc., supra,* 544 F.2d at 1373 (dissenting opinion of Judges Swygert and Bauer)), and multiple appeals from class denials are especially unlikely in view of the heavy burden an appellant must carry in showing that the District Judge has abused his discretion. The guidance provided by the Court of Appeals when reversing a class denial will also reduce the likelihood of an appeal from any further class denial.

(b) *The Death Knell Doctrine Furthers Important Purposes of Rule 23 of the Federal Rules of Civil Procedure*

Different statutes should be construed if possible to harmonize their purposes.** In consequence, it is significant in construing Section 1291 that the death knell doctrine

* See *Harris* v. *American Investment Co.,* 523 F.2d 220, 228 (8th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976).

** See, *e.g., Morton* v. *Mancari,* 417 U.S. 535, 551 (1974); *Hyrup* v. *Kleppe,* 406 F.Supp. 214, 217 (D.Colo. 1976).

serves important goals of Rule 23. As shown above, the death knell doctrine implements the principle embodied in Rule 23(b)(3) that small claimants often have no realistic access to the courts if they are unable to bring their claims as class actions. The death knell doctrine also avoids encouraging other persons to enter the litigation or commence separate actions at least until the appellate court has determined whether the denial of class status was correct. In consequence, the death knell doctrine assists in preventing the "multiplicity of activity" which this Court has termed "the principle function of a class suit." *American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538, 551 (1974). See also, *United Airlines* v. *McDonald,* —— U.S. ——, 97 S.Ct. 2464, 2470 n.15 (1977).

Encouraging intervention by persons who are concerned to protect their own claims would increase the prospects for complexity and delay, since such persons may settle their cases without appealing the class issue, thus requiring a new intervenor if the class issue is to be resolved.* Moreover, an intervenor might litigate the case on the merits successfully but be unable to serve ultimately as a class representative in a situation where liability was predicated on facts not applicable to the entire class.**

* Respondents submit that their tenacious effort to represent the class despite vigorous opposition over a five year period demonstrates that they are truly concerned to benefit the class. On such a record, the purposes of Rule 23 are better served by allowing respondents to continue their representation of the class than by encouraging intervention by persons who may use the threat of appealing the class issue only as a device to coerce a settlement of their individual claims.

** For example, an intervenor in the present action might have relied in part on oral misrepresentations. Liability to the class predicated on common written misrepresentations might require another intervenor and a new trial.

The "death knell doctrine" further facilitates the purposes of Rule 23 by avoiding the prospect for "one-way intervention." This Court has noted that the 1966 amendments to Rule 23 in part were designed to eliminate situations where class members could wait until a resolution of plaintiffs' claim on the merits before deciding whether to be bound by the results of the action. *American Pipe and Construction Co.* v. *Utah, supra,* 414 U.S. at 547. See also Advisory Committee's Note to Proposed Rule 23 of Rules of Civil Procedure, 39 F.R.D. 98, 105-06 (1966); *Jimenez* v. *Weinberger,* 523 F.2d 689, 698-700 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (19). If respondents cannot proceed on their individual claim and other parties intervene to prosecute claims which are in fact viable on individual bases, leaving the question of class relief to be resolved on an appeal subsequent to a decision on the merits, class members will have been able to avoid making any decision as to whether or not to opt out of the class action prior to a decision on the merits.*

Furthermore, rejection of the "death knell" argument might deprive class members of their right to remain passive prior to the time for filing claims. As this Court stated in *American Pipe and Construction Co.* v. *Utah, supra,* 414 U.S. at 552:

> "During the pendency of the District Court's determination in this regard, . . . potential class members are

* In the event that an intervenor tries his individual claim successfully and obtains reinstatement of the class on appeal, certain class members may wish to take advantage of the intervenor's victory while avoiding reimbursement to the intervenor of the substantial legal fees and costs absorbed in litigating the claim. Assuming the absence of a statute of limitations problem, the class members having large claims might opt out of the class, file suit elsewhere and seek to obtain a recovery from defendants by utilizing the collateral estoppel or precedential effect of the judgment in the original case.

> mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case."

Since *American Pipe and Construction Co.* v. *Utah* holds that statutes of limitations are tolled only until denial of class status, class members must intervene immediately to protect their rights. See discussion below, p. 40. If class status has been rejected improperly, refusal of an immediate appeal effectively denies class members their right to remain passive even without regard to limitations problems, because respondents' inability to proceed except on a class basis would mean that the rights of the other class members will simply not be prosecuted unless they intervene.

(c) *United Airlines, Inc.* v. *McDonald,* —— *U.S.* ——, *97 S.Ct. 2464 (1977) Does Not Render the Death Knell Doctrine Unnecessary*

Coopers errs in arguing that *United Airlines, Inc.* v. *McDonald,* —— U.S. ——, 97 S.Ct. 2464 (1977), renders the death knell doctrine obsolete. In *United Airlines,* the District Court denied class action status for lack of numerosity, and the action proceeded on individual claims. The action was settled after a determination on the merits and plaintiffs did not seek an appeal on the question of class certification. In consequence, respondent in *United Airlines* intervened for the purpose of appealing the District Court's denial of class status. This Court ruled that respondent had filed a timely motion to intervene under Rule 24(b), having filed within the thirty day time period prescribed for appeal.

United Airlines does not support Coopers' argument for a number of reasons. First, respondents' right to litigate their individual claim—which right as a practical matter depends on utilization of Rule 23—is not protected by the right of other persons to intervene. As shown above, if respondents do not proceed and are dismissed with prejudice for lack of prosecution, they would apparently be denied an appeal on the class issue and thus be denied the right to litigate their individual claim. Furthermore, dismissal of respondents' individual claim with prejudice would foreclose them from sharing in any class fund subsequently created by an intervenor.

Second, the *United Airlines* decision was expressly designed to avoid "a rule [which] would induce putative class members to file protective motions to intervene to guard against the possibility that the named representatives might not appeal from the adverse class determination." 97 S.Ct. at 2470 n.15. Encouraging intervention was deemed undesirable because it would engender the "very 'multiplicity of activity which Rule 23 was designed to avoid.' " *Ibid.* By assuming the need of intervenors to protect the class, petitioners' position encourages multiplicity of litigation and therefore conflicts with the purposes of the *United Airlines* decision.

Third, intervention following final judgment is a possible route to test class denials on appeal only when other class members are aware that a class action has been brought and that class status was denied, and only when intervention occurs within the thirty-day period for appeals. As stated by this Court in *American Pipe and Construction Co.* v. *Utah, supra,* 414 U.S. at 551-52, class members are not presumed to be aware of the existence of the class action until class notices have been distributed. The thirty-day deadline may well slip by before potential intervenors are alerted to the problem.

Petitioners apparently contend that a death knell appeal is rendered unnecessary by *United Airlines* v. *McDonald* because in their view dismissal of the action prior to a determination of the merits could be followed by intervention solely for the purpose of appealing the class issue. Petitioners' argument defeats itself, because such an intervenor would be seeking exactly what respondents now seek—resolution of the class issue prior to determination of the merits. Thus, the result of encouraging intervention in such a situation would be to add a new party and delay the appeal without in any way reducing the prospect for piecemeal appeals. Application of the death knell doctrine will avoid such multiplicity of litigation.

(d) *The Death Knell Doctrine Does Not Discriminate Against Defendants In Class Actions*

The death knell doctrine does not discriminate against defendants, but is simply the result of an evenhanded application of the rule that appeals may only be taken from final decisions. Respondents cannot prosecute the action on their individual claim and therefore will have no opportunity to appeal unless the appeal can be taken at the time class status is denied. On the other hand, petitioners are not deprived of their opportunity to appeal from a grant of class status if they do not have an immediate appeal, because the litigation will continue and petitioners can appeal that determination after a final judgment on the merits.

The law is replete with examples of situations where the party losing a motion is allowed an immediate appeal under the final decision rule while the other party would not have been entitled to an immediate appeal if he had lost the motion. *E.g., Swift & Company Packers* v. *Compania Colombiana del Caribe, supra,* 339 U.S. at 689 (immediate appeal from order vacating attachment proper although no

immediate appeal would have been authorized from order granting attachment); *United Southern Companies, Inc.* v. *Duckworth,* 410 F.2d 377 (5th Cir. 1969) (immediate appeal from denial of summary judgment motion improper); *Compagnie Nationale Air France* v. *Port of New York Authority,* 427 F.2d 951, 954 (2d Cir. 1970) (immediate appeal from grant of new trial improper). See generally, 9 Moore, *Federal Parctice,* ¶110.07, pp. 108-09; ¶110.08[1] (2d ed. 1975).

In light of such precedent, petitioners' argument that the death knell doctrine discriminates against class action defendants should be recognized for what it is: an alternative form of petitioners' argument that class actions have an unfair *in terrorem* effect because of the expense of litigation or the amount of potential damages. The argument is ill founded and is rebutted in detail at pp. 45-54 below. It is appropriate to note, however, that such argument is disingenuous on the record below. Petitioners neither settled this action after class certification nor sought summary judgment or an early trial. Rather, petitioners have in fact raised one class issue after another in this action for almost five years—mostly on repetitious grounds—as a means of preventing a prompt determination of the merits. As the Eighth Circuit noted (Pet. Cert. p. A-20; 550 F.2d at 1112), such activities have greatly increased the expense of this litigation to all parties.

(e) *The Ninth Circuit Version of the Death Knell Doctrine Would Increase the Complexity of the Litigation Without Serving the Purposes of the Final Decision Rule*

The Ninth Circuit has ruled that a plaintiff who desires to appeal under the death knell doctrine must show not only that his own claim is not practicable on an individual

basis, but that "it is highly unlikely that any member of the purported class has a claim justifying separate litigation." *Hooley* v. *Red Carpet Corporation,* 549 F.2d 643, 645 (9th Cir. 1977). As shown above (see p. 25), denying respondents an immediate appeal because other persons may intervene would deny respondents their right to obtain any appellate review on a question determinative of their ability to prosecute their own individual claim. The *Hooley* approach will increase multiplicity of activity by encouraging intervention, and intervention will foster rather than avoid piecemeal appeals for the reasons shown above.

The *Hooley* doctrine is not subject to easy application and would seriously complicate the litigation. Identification of "economically viable" claims of possible intervenors who have not in fact appeared is a highly uncertain endeavor. Such a determination is especially difficult in light of the very extensive effort and enormous expense frequently required for vigorous litigation of substantial claims under statutes such as the federal securities and antitrust laws.* Thus, in *duPont Glore Forgan Inc.* v. *American Telephone & Telegraph Co.,* 69 F.R.D. 481 (S.D. N.Y. 1975), Judge Edward Weinfeld found that "economic reality" would prevent Monsanto Company from proceeding solely on its individual claim of $130,000:

> "This observation is pertinent to the response by newly retained counsel for plaintiffs to the court's inquiry why Monsanto, itself no corporate pigmy, would not,

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* See discussion in Kalven & Rosenfield, *The Contemporary Function of a Class Suit,* 8 U.Chi.L.Rev. 684, 684-5 (1941). The authors analyze the plight of persons who purchased part of a debenture issue of Insull Utilities Investments and show that the holder of a $10,000 claim could not individually sustain the expenses of what would have had to be a $60,000,000 lawsuit. *Id.* at 685, including n.4.

without class action determination, prosecute its claim, which amounts to $130,000. Counsel's reply was that, while Monsanto was willing to continue to pay disbursements which, to date, have been substantial, the time-cost factor of legal fees in view of the vigor of defendants' opposition, made it uneconomical to proceed with the suit on an individual basis even assuming an ultimate recovery—in fact, Monsanto would, if required to proceed on an individual basis, forego its claim. Recent experience with legal charges and their computation suggests that counsel's statement was not exaggerated. Thus, the assertion that this action will not go forward at all if class action status is denied is plausible. The hard fact is that economic reality indicates the likelihood that unless this action is permitted to proceed as a class suit, it is the end of this litigation." *Id.* at 487 (footnote omitted)

In *Windham* v. *American Brands, Inc.*, 539 F.2d 1016, 1021 n.1 (4th Cir. 1976), the Court stated: "The hope of recovering even three times $16,000 . . . would hardly lead a prudent man to begin an anti-trust suit." See also, the discussion of the extensive work involved in litigating a substantial securities laws claim in *Blank* v. *Talley Industries, Inc.*, 390 F.Supp. 1 (S.D.N.Y. 1975).

At minimum, the *Hooley* doctrine would require extensive and time consuming discovery in federal securities litigation concerning the identities of class members, the size of individual claims, the cost of litigating, and the financial ability and willingness of any class member to intervene.* The District Court would apparently have to

* It should also be noted that the size of an individual claim may not indicate the likelihood of intervention where, as here, the District Judge has already evinced a lack of sympathy for plaintiffs' position.

consider the need for, propriety of, language of, and proper distribution of any notice to class members requesting such information. See, *Hooley* v. *Red Carpet Corp., supra,* 549 F.2d at 646. Court approval of communications with class members would be required to assure that such communications are not subject to attack under rules prohibiting solicitation of litigation by counsel. See, *e.g.,* American Bar Association Code of Professional Responsibility, DR 2-103(A), DR 2-104(A); Moore, Federal Practice, Manual for Complex Litigation, §1.41 (1977). See *Carlisle* v. *LTV Electrosystems, Inc.,* 54 F.R.D. 237, 240 (N.D.Tex. 1972), *appeal dismissed* (No. 72-1065, 5th Cir., June 23, 1972) (unreported opinion).

(f) *The Court of Appeals Had Ample Grounds for Determining That the Death Knell Doctrine Was Applicable*

The Eighth Circuit's holding that the death knell doctrine applies is strongly supported by extensive material in the record concerning respondents' economic condition and prospective costs of the litigation, and by counsel's representation that respondents could not proceed solely on their individual claim. Respondents' loss was approximately $2,650 (A 117), and respondents had been advised by counsel that the out-of-pocket expenses alone of the action might well exceed $15,000. (A 185-86) Cecil and Dorothy Livesay had salaries of $16,000 per year and $10,000 per year, respectively. (A 128) Out of a total net worth of approximately $75,000, only $4,000 was in cash and the remainder was equity in the Livesay's home and investments. (A 127-31; 138-39, 142) At the time

of their depositions, the Livesays had two children, aged 18 and 3, the older of whom was about to begin college. (A 79-80)

Cecil Livesay originally stated at his deposition that he would not seek to recover his individual loss if the Court did not certify the class. (A 68-69) Subsequently, he stated that "I couldn't give a yes or no" answer to such question, but would follow his attorneys' advice on whether he should proceed. (A 72-73) The Eighth Circuit was apprised during the appeal that respondents' counsel believed continuance of the action on the individual claims made no economic sense and that counsel could not advise respondents to continue in such a situation. (Reply Brief for Appellants-Petitioners, p. 5.)

Respondents' former counsel stated at the evidentiary hearing on the class motion that he had been retained by three class members who had substantial claims and who had indicated willingness to share the expenses of the litigation. (A 133-35; A151-53) The record does not, however, support a finding that such individuals ever made any binding or firm commitment to share such expenses. (See A 135, A 151-53) Respondents' present counsel advised the Eighth Circuit that they had not been retained to represent any of the persons described by respondents' former counsel and that they knew of no class member who had stated a willingness to intervene in the action. (Reply Brief for Appellants-Petitioners, pp. 5-6)

The Eighth Circuit recognized the preferability of a procedure where the District Court makes the initial finding that the death knell has rung, but noted that such a finding is not an absolute requirement when, as in the present case, the record is adequate for such a determination by the Court of Appeals. (Pet. Cert. p. A 15 n.5; 550

F.2d at 1110)* Moreover, the District Court did find after the evidentiary hearing on the class motion that an immediate appeal under the death knell doctrine would be appropriate if it ruled against class status. (A 166) Such finding is also implicit in Judge Wangelin's stay of substantive discovery pending resolution of the class issues, since there would be no reason for such a stay if the District Court believed the action would continue even if class status were denied.

Petitioners' argument that only the interests of respondents' counsel are truly at stake is false. While an attorney's unwillingness to prosecute a small claim on a contingent basis may reflect his own evaluation of whether he can sustain such an effort economically, the ultimate interest affected is that of the potential client because it is the client who will receive no protection if the unavailability of a class action renders it unfeasible for any attorney to represent him.**

Nor should the Court assume that respondents would receive a District Court award of attorneys fees if they

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* This Court and the Second and Sixth Circuits have taken judicial notice of the fact that certain plaintiffs' claims were so small as to render prosecution absent class certification impracticable. *E.g., Eisen IV,* 417 U.S. at 161; *Ott* v. *Speedwriting Publishing Co., supra,* 518 F.2d at 1149; *Green* v. *Wolf Corp.,* 406 F.2d 291, 295 n.6 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969).

** Punta Gorda's analysis of the considerations to be weighed in determining the feasibility of proceeding on an individual claim after denial of class status is an exercise in sheer and unsupported speculation. See Brief for Punta Gorda, pp. 13-19. Such speculation deserves little weight as against the concrete reality of the substantial resources which would have to be expended in prosecuting the individual claim to a conclusion before an appeal on the class question could be taken, and the risk of a total loss of such resources and denial of attorneys' fees if class status is not ultimately restored.

proceeded on their individual claim. An award of attorneys fees payable by defendants in connection with a recovery on respondents' claims under the Securities Act of 1933 would not be available if respondents settled these claims individually (see Section 11(e) of such Act, 15 U.S.C. §77k(e)), and the Courts have held that the plaintiff must establish that the defense bordered on frivolity in order to obtain an attorneys fee on an individual claim under that Act. *E.g., Gerstle* v. *Gamble-Skogmo, Inc.,* 478 F.2d 1281, 1309 n. 33 (2d Cir. 1973); *Can-Am Petroleum Co.* v. *Beck,* 331 F.2d 371, 374 (10th Cir. 1964). Given the lack of statutory authorization for an attorneys' fee award on a non-class claim under Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(b)), an award of attorneys' fees to a plaintiff suing on an individual claim under that section would be unlikely unless the rarely applied "bad faith" exception were applicable. See, *e.g., Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 210 n.30 (1976); *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975); *Straub* v. *Vaisman & Co.,* 540 F.2d 591, 599-600 (3d Cir. 1976); *Hail* v. *Heyman-Christiansen, Inc.,* 536 F.2d 908 (10th Cir. 1976).

3. The Collateral Order Doctrine Provides Alternative Bases for Allowing Respondents an Immediate Appeal From the Decertification Order

As mentioned above, the death knell doctrine falls comfortably within the collateral order doctrine. Respondents took the position below that additional grounds exist for predicating jurisdiction on the collateral order doctrine. Respondents submit that the Court should affirm the Eighth Circuit decision on such grounds if the Court should decide that appellate jurisdiction is not sustainable under the narrower death knell doctrine.

The collateral order doctrine allows immediate appeal from orders which do not terminate the entire litigation when they

> ". . . finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949).

Recent decisions of this Court attest to the continuing vitality of the collateral order doctrine. *E.g., Abney* v. *United States, supra,* 431 U.S. at 658; *Mathews* v. *Eldridge, supra,* 424 U.S. at 331 n.11 (1976); *Eisen IV, supra,* 417 U.S. at 170-71.

The order below meets all the requirements of the collateral order doctrine. The order finally determines respondents' right to bring this action as a class action since there can be no change in facts which will lead Judge Wangelin to change his decision that respondents have failed to prosecute the litigation. Furthermore, the issues raised on the appeal are independent of the merits. No investigation of the merits by the Eighth Circuit was necessary in order to determine whether or not Judge Wangelin abused his discretion by decertifying the class for alleged unreasonable delay in prosecuting the litigation.

Moreover, absent class members will be denied important rights* without any effective appellate review absent an immediate appeal from the decertification.

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* Certain Courts may have taken conflicting positions on whether the collateral order doctrine requires a question the resolution of which will impact upon other cases. Compare *In re Cessna Dis-*

First, class members who would prefer to exercise their right under Rule 23 to remain passive (see discussion above, pp. 28-9) will be forced to intervene immediately after decertification to protect their individual claims against the running of the statute of limitations. Respondents' claims under Section 11 and 12(2) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §77k, 771(2), are subject to a limitation period of one year from the date upon which discovery of misleading omissions "should have been made by the exercise of reasonable diligence" and to an absolute three-year limitation. Section 13 of the 1933 Act, 15 U.S.C. §77m. Respondents were actively investigating a lawsuit against petitioners in May-June 1973, and the lawsuit was commenced in July 1973. While the statute of limitations was tolled by commencement of the class action, it began running as to absent class members from the date of decertification. *E.g., American Pipe and Construction Co.* v. *Utah, supra; Eisen IV*, 417 U.S. at 176 n.13. As of such date, class members had approximately nine months within which to bring suit under Sections 11 and 12(2). The likelihood that respondents could litigate their individual claim and reinstate the class on appeal within nine months was virtually nil.

The statute of limitations would not bar continuation of the class action if the class denial is reversed on an appeal subsequent to litigation of individual claims. *United Airlines* v. *McDonald, supra,* 97 S.Ct. at 2468-69. See also

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tributorship Antitrust Litigation, 532 F.2d 64, 67 (8th Cir. 1976) with *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.,* 455 F.2d 770, 773 (2d Cir. 1972). This Court has in fact cited *Cohen* v. *Beneficial Industrial Loan Corp., supra,* in support of the appealibility of issues which are of major importance in the action but which would have no impact beyond the immediate litigation. *E.g., Stack* v. *Boyle, supra,* (allowing immediate appeal from order refusing to reduce bail); *Roberts* v. *United States District Court, supra.*

Gelman v. *Westinghouse Electric Corp.,* —— F.2d —— (No. 77-1170, 3d Cir., June 6, 1977) (opinion not yet reported); *Jimenez* v. *Weinberger, supra,* 523 F.2d at 696. However, this Court's opinion in *United Airlines* v. *McDonald* leaves open the possibility that the limitations period may run on individual claims prior to the date of determination of the appeal if the appeals process ultimately affirms the denial of class status. See discussion, 97 S.Ct. at 2468-69. Such a prospect is suggested in *Knable* v. *Wilson,* 23 F.R.Serv.2d 146, 149 (D.C. Cir. 1977) where the Court stated that the limitations problem of absent class members could only be rectified "by a reversal enabling unjoined claimants to come in as members of the class." Consequently, absent class members who prefer to exercise their right to remain passive may be forced to intervene to protect their position, only to discover at a later date that intervention was unnecessary because the appeals court does in fact reverse the denial of class status.

Absent an immediate appeal, other class members may also be irreparably injured by loss of their standing to seek class relief in this action if respondents should settle their claim prior to determination of the merits. A number of this Court's recent rulings have indicated that class relief might not be available on appeal if the plaintiff's claim became moot prior to class certification. *E.g., Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976); *Sosna* v. *Iowa,* 419 U.S. 393 (1975); *Board of School Commissioners* v. *Jacobs,* 420 U.S. 128 (1975). In *United Airlines* v. *McDonald, supra,* the Court recognized that a plaintiff may appeal a class denial after a favorable District Court decision on the merits of his individual claim (97 S.Ct. at 2469, including n.14). While that case involved an appeal after a settlement, the Court stressed

that the "settlement" had occurred only after a victory on the merits and after the guiding principles for damage computation had been established. *Id.* at 2469 n.14. Since a settlement typically moots whatever issues are associated with the individual claim,* *United Airlines* v. *McDonald* may not resolve all question as to whether class issues could be appealed were determination of the merits not to have preceded the settlement.

4. Appellate Jurisdiction May Also Be Sustained Under *Gillespie* v *United States Steel Corp.*, 379 U.S. 148 (1964)

In *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), this Court declared that a Court of Appeals may hear an appeal in a case of "marginal finality" where the questions presented are "fundamental to the further conduct of the case":

> "We think that the questions presented here are equally 'fundamental to the further conduct of the case.' It is true that if the District Judge had certified the case to the Court of Appeals under 28 U.S.C. §1292(b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in §1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. §1291 (1958 ed.). We therefore proceed to consider the correctness of the Court of Appeals' judgment." 379 U.S. at 154.

According to Professor Moore:

> ". . . if an order is arguably reviewable by virtue of some other provision, and the question presented is of a kind that would be certifiable under §1292(b), the court of appeals can, if it finds the order in fact to be non-appealable, proceed to determine the question on the assumption that the district court would or should have certified it." *9 Moore, Federal Practice,* ¶110.22[3], p. 263 (2d ed. 1975).

* See, Justice Powell, dissenting in *United Airlines* v. *McDonald*, 97 S.Ct. at 2473.

The issues raised in this appeal are indeed "fundamental to the further conduct of the case." The record supports respondents' position that their claim is not economically viable on an individual basis, and as shown above, important rights of respondents and class members may be irretrievably lost absent an immediate appeal. Moreover, at the conclusion of the evidentiary hearing on the class motion, Judge Wangelin stated his opinion that an immediate appeal would be appropriate if he refused to certify the class, and that such an immediate appeal might materially advance the ultimate termination of the litigation. (A 166) In consequence, it would be appropriate for the Court to affirm the Eighth Circuit's assumption of jurisdiction under the *Gillespie* decision in the event it should regard the District Court order as one of "marginal" finality.

5. Conditioning an Immediate Appeal on District Court Certification Under 28 U.S.C. §1292(b) Would Improperly Deny Respondents Their Rights Under 28 U.S.C. § 1291

28 U.S.C. Section 1292(b) states as follows in relevant part:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an imme-

diate appeal from that order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order."

Respondents submit that the Third and Seventh Circuits have erred in holding that discretionary District Court certification under Section 1292(b) is the sole route for obtaining an immediate appeal from denial of class status. *E.g., Katz* v. *Carte Blanche Corp., supra; Anschul* v. *Sitmar Cruises, Inc., supra.* If the decision decertifying the class is in fact a "final decision" within the meaning of Section 1291, respondents are entitled to an immediate appeal from such decision as of right. Allowing an immediate appeal only if the District Court certifies the issue and the Court of Appeals agrees to accept the appeal improperly conditions the exercise of such right on two separate discretionary decisions.*

While defendants cite certain cases where denials of class status have been certified for an interlocutory appeal, the availability of an appeal under Section 1292(b) in any given situation is highly uncertain. Thus, Judge Gibbons, the author of the opinion which established District Court certification as the sole method of obtaining immediate

* In *Share* v. *Air Properties, Inc., supra,* 538 F.2d at 281 n.1, the Court stated:

"Nor does certification under 28 U.S.C. §1292(b) or mandamus solve the problem, as *Hackett* suggests. The very error with which we are concerned is that of the district judge, and it is precisely in those cases where he fails to certify under §1292 (b) where the harm will be manifest. For those cases in which there has been error and no section 1292(b) certification, mandamus, as traditionally formulated, imposes too high a standard to give adequate protection to plaintiffs."

appeal from a denial of class status in the Third Circuit in damage actions (*Hackett* v. *General Host Corp., supra*), now complains that "a plurality of this court *en banc* has demonstrated a determination to make the §1292(b) route a practical impossibility." *Gardner* v. *Westinghouse Broadcasting Co.,* 559 F.2d 209, 221 (3rd Cir. 1972) (dissenting opinion), *cert. granted,* December 5, 1977, 46 U.S.L.W. 3373. See also, *Anschul* v. *Sitmar Cruises, Inc., supra,* 544 F.2d at 1372 n.4 (dissenting opinion) (". . . certification of appeals under section 1292(b) is not a common practice encouraged in this circuit or most others"); *Link* v. *Mercedes Benz of North America, Inc.,* 550 F.2d 860, 873-74 (3rd Cir. 1977) (dissenting opinion), *cert. denied,* U.S. (1977).

Moreover, section §1292(b) is limited to appeals from "a controlling question of law." Courts may diverge on whether such requirement is met where the appeal involves an issue as to which the District Court has discretion. Compare *J.C. Trahan Drilling Contractor, Inc.* v. *Sterling,* 335 F.2d 65 (5th Cir. 1964), with *Katz* v. *Carte Blanche Corp., supra,* 496 F.2d at 752-56. See also, 9 Moore, Federal Practice, ¶110.22[2], p. 261 (2d ed. 1975); Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. §1292(b),* 88 Harv.L.Rev. 607, 618 n.57 (1975). Consequently, it would not be safe to assume that District Judges or Circuit Courts will regard a denial of class certification as appealable under section 1292(b) in all instances where the denial of certification does, in fact, terminate the litigation.

6. Petitioners' Argument That the Court Should Adopt a Rule Aimed at Discouraging Class Actions Misdescribes the History of Experience With Class Actions and Ignores the Important Public Purposes Served by Rule 23

Petitioners launch an attack on class actions in general, reciting numerous criticisms which have little basis in fact

and which ignore the extent to which the class action remedy has served its intended purposes.

Petitioners stress an alleged *in terrorem* effect of class actions, but ignore the fact that absent Rule 23, the very real *in terrorem* considerations favoring defendants would effectively prevent most persons with modest claims from ever resorting to the courts to obtain relief.

Actions like the case at bar involving small claims under the federal securities laws are a prime example. Defendants in such actions typically are corporations having extensive resources and the ability to retain high caliber law firms to wage vigorous defenses. Unlike other types of litigation where the plaintiff often has specific knowledge of defendants' wrongdoing, the defrauded shareholder is normally remote from activities within the defendant company and not in possession of the evidentiary facts needed to prove liability. Extensive discovery must be conducted on plaintiff's behalf, including detailed analyses of voluminous documents relating to the financial condition of the subject company and numerous depositions of the officers of such company and its accountants. Since the fee which an attorney could charge for representing a small claimholder in such an action could never compensate the attorney for his efforts in vigorously litigating the action, such holders are effectively denied any redress unless the case can be brought as a class action.*

Even where class relief is sought, there is often a powerful *in terrorem* effect working to defendants' advantage. The large companies which defend such actions can devote substantial resources to the task, while plaintiff's attorneys must forego compensation until a successful result in the action. Well financed defendants will frequently cause

* See cases and article cited above, pp. 33-34.

plaintiffs to spend years litigating the class question or other preliminary matters—as they have in this action—thus retarding the progress of the law suit on the merits.

Recent disclosure of scandals such as those involving the Equity Funding Corporation, National Student Marketing, and the Franklin National Bank failure highlight the need of small shareholders for an effective means of obtaining representation. The Securities and Exchange Commission ("SEC") has stated publicly that in view of its own limited resources the activities of the private bar are essential to protection of investors*, and this Court has recognized that private securities actions serve the prophylactic purpose of enforcement of the securities laws for the protection of all investors. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 382 (1970); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964).

Coopers' insistence that small claim-holders are less deserving of protection by the Courts than are large claimholders betrays a callous attitude which is diametrically opposed to the purposes and values underlying Rule 23. See, *e.g.*, Coopers' Brief, pp. 27-28. The authors of Rule 23 were vitally concerned to avoid "freezing out the people—especially small claims held by small people. . . ." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv.L.Rev. 356, 398 (1967). Indeed, when analyzed in human terms, it is apparent that a two thousand dollar loss may have a far more serious impact upon a person of modest means than a $200,000 loss may have on a multi-

* See SEC *amicus* brief cited at length in *Dolgow* v. *Anderson*, 43 F.R.D. 472, 482-84 (E.D.N.Y. 1968). Professor Loss has stated: "The ultimate effectiveness of the federal [securities] remedies . . . may depend in large part on the applicability of the class action device." 3 Loss, *Securities Regulation* p. 1819 (2d ed. 1961).

million dollar corporation. Such a recovery could, for example, enable a small claim-holder to meet pressing bills or provide respondents with college tuition for their children.* Underlying Coopers' argument is a contempt for the needs and interests of persons having limited resources. Respondents respectfully submit that such contempt has no proper place in our legal system.

Petitioners complain that an *in terrorem* effect of class actions induces settlements.** Certainly the prospect of liability and damages tends to induce settlements,*** be it in individual actions or in class actions. However, there is no reason to suppose that such pressures are unfair. If petitioners have violated the securities laws, injuring thousands of investors, it is appropriate that a suit to recoup the loss should create proportionate pressure. As Professor Dole has pointed out, class suits based on meritorious claims are quite different from "strike suits" based on frivolous claims. Rule 56 provides safeguards against the latter. See Dole, *The Settlement of Class Actions for Damages,* 71 Colum.L.Rev. 971, 974 (1971).

Petitioners' claim that in consequence of an *in terrorem* effect all class actions are settled simply is not true. Many class actions have proceeded to trial. *E.g., Gerstle* v. *Gamble-Skogmo, Inc.,* 478 F.2d 1281 (2d Cir. 1973); *Beecher* v. *Able,* CCH Fed. Sec. L. Rep. ¶94,450 (S.D.N.Y. 1974); *Gould* v. *American Hawaiian Steamship Co.,* 362 F.Supp.

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* See A 79-80.

** Coopers Brief, p. 31.

*** The Courts have long recognized that settlements are to be encouraged as a matter of public policy. *E.g., Airlines Stewards and Stewardesses Association* v. *American Airlines, Inc.,* 455 F.2d 101, 109 (7th Cir. 1972); *D.H. Overmeyer Co.* v. *Loftin,* 440 F.2d 1213, 1215 (5th Cir. 1971).

771 (D.Del. 1973). *judgment vacated,* 535 F.2d 761 (3rd Cir. 1976); *Dolly Madison Industries, Inc. Litigation,* No. 70-2585 (E.D.Pa. 1973) (settled after four months of trial); *Stamps* v. *Detroit Edison Co.,* 365 F.Supp. 87 (E.D.Mich. 1973); *Kohn* v. *American Metal Climax, Inc.,* 322 F.Supp. 1331 E.D.Pa. 1971), *aff'd in part, rev'd in part,* 458 F.2d 255 (3d Cir. 1972), *cert. denied,* 409 U.S. 874 (1973); *Feit* v. *Leasco Data Processing Equipment Corp.,* 332 F.Supp. 544 (E.D.N.Y. 1971); *Robinson* v. *Lorillard Corporation,* 319 F.Supp. 835 (M.D.N.C. 1970), *aff'd in part rev'd in part,* 444 F.2d 791 (4th Cir.), *cert. denied,* 404 U.S. 1006 (1971); *Siegel* v. *Chicken Delight, Inc.,* 311 F.Supp. 847 (N.D.Cal. 1970), *aff'd in part, rev'd in part,* 448 F.2d 43 (9th Cir. 1971), *cert denied,* 405 U.S. 955 (1972); *Brennan* v. *Midwestern United Life Insurance Company,* 286 F.Supp. 702 (N.D.Ind. 1968), *aff'd,* 417 F.2d 147 (7th Cir. 1969), *cert. denied,* 397 U.S. 989 (1970); *Escott v. BarChris Construction Corp.,* 283 F.Supp. 643 (S.D.N.Y. 1968).

Nor is there any indication that the proportion of settled class actions exceeds the percentage of settlements of non-class actions. Only 7.8% of *all* federal court civil cases which were terminated during the year ending June 30, 1977 (other than land condemnation cases) reached the trial stage* and a Congressional study has found that the proportion of class actions tried in the District of Columbia Circuit "is consistent with the proportion for all civil actions" in the same district.**

Petitioners' arguments rest upon surmise. That surmise lost whatever credibility it possessed with publication of an empirical study of class actions by the Commerce Committee of the United States Senate in 1974. Committee on

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* 1977 Annual Report of the Director, Administrative Office of the United States Courts, p. A-24.

** Committee on Commerce, United States Senate, *Class Action Study,* 93rd Cong.2d Session (1974), Committee Print, p. 10.

Commerce, United States Senate, *Class Action Study*, 93rd Cong. 2d Sess. (1974) (*"Class Action Study"*).* That study strongly refutes the argument that defendants faced with class actions are forced to settle non-meritorious claims, finding that:

> "If frivolous cases are brought, the high proportion of dismissals and summary judgments indicates that the class action is not a very effective tool for forcing settlements. Moreover, defendant attorneys interviewed indicated that if faced with a weak suit they certainly would fight it on the merits initially before agreeing to settle." *Id.*, p. 10 (footnote omitted).

In addition:

> "[i]nterviews with defendant attorneys disclosed that no more than a handful would label their opponents' cases as frivolous." *Id.*, p. 9.

Nor is there a convincing basis for belief that the costs of defending against class actions are so substantial that defendants have no recourse but to settle. A recent review of fee awards in securities class actions indicates that fees have typically represented less than 25% of the total settlement. 3 Newberg, Class Actions, pp. 1327-1343 (1977). Such fees would at minimum reflect the standard hourly rate of plaintiffs' attorney for time devoted to the action, and will often include an additional amount reflecting the contingent nature of the litigation. *E.g., Lindy Bros. Builders Inc. of Philadelphia* v. *American R & S San Corp.*, 487 F.2d 161, 167-68 (3rd Cir. 1973). If we assume a rough

* The Ninth Circuit has recognized that the *Class Action Study* constitutes the best available empirical evidence concerning the alleged *in terrorem* effect of class actions. *Blackie* v. *Barrack*, 524 F.2d 891, 899 n.15 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

equivalence between plaintiffs' and defendants' legal fees in the same action, it would appear that defendants have been settling class actions for amounts far in excess of their legal fees.

Petitioner's argument that class actions do not really benefit class members is also incorrect. Numerous examples can be given of extremely substantial class relief.* The *Class Action Study* reports that in 38% of the cases where monetary relief occurred, the recovery exceeded $1 million and in 13% of such cases damages exceeded $5 million. *Id.*, p. 27. Recoveries in labor pension fund cases ranged from $6 million to $300 million, including prospective relief. *Id.*, p. 21. Furthermore, the *Class Action Study* found that class recoveries have not been consumed by attorneys' fees, notice costs, and administrative expenses. *Id.*, pp. 17, 29.

Nor are class actions the burden to federal courts described by petitioners. Recent statistics show that class actions represented only 2.4% of all civil cases filed in fiscal 1977 and only 4.1% of all of civil cases pending, and the

* *E.g., In re Equity Funding Corp. of America Securities Litigation*, M.D.L. Docket No. 142, C.D.Cal., September 29, 1977, (approximately $60 million) (unreported order); *Arenson* v. *Board of Trade of City of Chicago*, 372 F.Supp. 1349, 1355-56 (N.D.Ill. 1974) (prospective benefits possibly in excess of $800,000,000). Recent examples of class relief in actions in which counsel for respondents participated include, but are not limited to: *In re Consolidated Pre Trial Proceedings in Ampex Securities Cases*, N.D. Cal., Master File No. C-72-360 SW ($9,000,000 settlement approved on October 6, 1976 in unreported decision) (respondents' counsel served as co-lead counsel); *Seiden* v. *Nicholson*, 72 F.R.D. 201 (N.D.Ill. 1976) ($9.5 million settlement) (respondents' counsel were members of plaintiffs' steering committee); *City of New York* v. *Darling-Delaware* and consolidated cases, 1977-2 CCH Trade Cases ¶61,802 (S.D.N.Y. 1977) ($5.1 million); *Dennis* v. *Saks & Co.* and consolidated cases, S.D.N.Y., 77 Civ. 4419 ($5.2 million settlement approved October 6, 1976 in an unreported decision); *502 Broadway Corp., et al.* v. *MacArthur*, D.Del. Nos. 75-172 and 75-173, ($1.3 million settlement approved on March 18, 1977 in an unreported decision) (respondents' attorneys were lead counsel).

number of class action suits filed decreased by 10.9% from the prior year.* The great bulk of such cases are civil rights (including prisoner petition), consumer, and labor cases. *Id.* at 126-127. Securities and anti-trust actions represented only 5.5% and 7.3% respectively of the civil class actions commenced in fiscal 1977. *Ibid.*

The *Class Action Study* found that class actions in the District of Columbia "do not appear to place an overwhelming burden on the federal district court",** and that "most class actions do not take markedly longer from filing to disposition in district court than do civil actions in general." *Class Action Study,* pp. 4 and 12. When burdens do arise, it is respectfully suggested that they often result from defendants' employing tactics such as those deplored by the Eighth Circuit in the present case.

Similar allegations of unfairness and *in terrorem* effect were raised several years ago by the Corporate Section of the American Bar Association, but upon investigation were rejected by other Sections (including the Insurance, Negligence and Compensation Law Section in two lengthy reports),*** and by an Ad Hoc Committee appointed to study class actions. The Committee resolved that "no restrictive changes should be made at this time in the provisions of

* Annual Report of the Director for 1977, Administrative Office of the United States Courts, p. 121. Moreover, the number of class action litigations actually conducted are substantially less than the number of class action complaints filed, since securities and anti-trust class actions are often consolidated with numerous other class actions having common issues. See, *e.g., Class Action Study,* p. 6.

** At the time of the *Class Action Study* the District of Columbia had the fourth largest number of class actions in the country. *Class Action Study,* p. 3.

*** Insurance, Negligence and Compensation Law Section (ABA), *Comments on Recommendations Re Consumer Class Actions for Monetary Relief. Parts I and II* (1974).

Rule 23 of the Federal Rules of Civil Procedure . . . and any consumer class action legislation adopted by a state in the immediate future should be patterned after Federal Rule 23." That resolution, rejecting accusations of unfairness and endorsing Rule 23, was subsequently approved at the 1974 convention of the American Bar Association and remains the official position of the Association.*

The importance of securities class actions over the past decade in extending shareholders' rights and elevating the standards to which persons connected with securities offerings are held has been confirmed by the Association of the Bar of the City of New York:

> "The precise effect which class actions have had upon the financial community cannot be measured. It is no overstatement that cases such as *Escott* v. *Barchris Construction Corp.,* 283 F.Supp. 643 (S.D.N.Y. 1968) and *Feit* v. *Leasco Corp.,* 332 F.Supp. 544 (E.D.N.Y. 1971) have had a profound—and beneficial—influence upon the diligence of directors, underwriters, accountants, lawyers and others connected with the public offering of securities." *Class Actions—Recommendations Regarding Absent Class Members and Proposed Opt-In Requirements,* Association of the Bar of the City of New York (1973), footnote, p. 16.

In light of such favorable experience, in 1975 New York State adopted a class action law designed to broaden the availability of the type of relief provided by Rule 23. New York State Civil Practice Law and Rules §§ 901-09.

Other disinterested and learned commentators have applauded both the promise and the operation of Rule 23 in fairly and efficiently securing relief from serious violations

* ABA, *American Bar News,* September 1974, p. 6.

of law affecting numerous persons. *E.g.*, Hazard, *The Effect of the Class Action Device Upon the Substantive Law*, 58 F.R.D. 307 (1973); Homburger, *State Class Actions and the Federal Rule*, 71 Colum.L.Rev. 609 (1971); Miller, *Problems in Administering Judicial Relief In Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501 (1972).*

POINT II

If This Court Should Decide That the Eighth Circuit Lacked Jurisdiction Over the Appeal, the Court Should Remand This Case to the Eighth Circuit For Consideration of Respondents' Mandamus Petition.

The Eighth Circuit dismissed respondents' mandamus petition as moot since it granted the full relief requested on appeal. Should this Court determine that the Eighth Circuit lacked jurisdiction of the appeal, respondents request the Court to remand the proceedings to the Eighth Circuit for reconsideration of respondents' mandamus petition.**

The District Court predicated decertification on delay of the litigation when, as found by the Court of Appeals, the District Court's own decisions—including its refusals to comply with the prior mandate of the Eighth Circuit and acquiescence in petitioners' efforts to delay—prevented the

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* Professors Hazard and Miller are respectively members of the law faculties at Yale and Harvard, and Professor Homburger is Professor of Law Emeritus at the State University of New York at Buffalo. Professor Miller is co-author of Wright and Miller, *Federal Practice and Procedure*.

** The fact that respondents have not cross-petitioned for certiorari with respect to dismissal of the mandamus petition does not deprive this Court of power to provide the alternative relief requested. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); *Langnes* v. *Green*, 282 U.S. 531, 535-540 (1931).

action from moving forward. Respondents submit that the District Court's ruling constitutes an exceptional abuse of judicial authority justifying issuance of a writ of mandamus. See, *e.g.*, *Will* v. *United States*, 389 U.S. 90, 95 (1967). In light of the Eighth Circuit's unanimity in holding that the District Court abused its power, respondents submit that the Court of Appeals should have an opportunity to reconsider issuance of the writ if relief on appeal is unavailable.

POINT III

The Court of Appeals Acted Within the Proper Scope of Its Authority in Reversing the District Court's Decertification Order.

1. The Court of Appeals Properly Held That the District Court Abused Its Discretion In Decertifying the Class For an Alleged Failure to Prosecute the Litigation

This Court has emphasized that a District Court's discretion must be guided by "'sound legal principles'" and that the concept of discretion does not shield a District Court from "thorough appellate review." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975). Thus, numerous cases recognize that a Court of Appeals may reverse a District Court order denying class status if the District Court has abused its discretion. *E.g.*, *Guerine* v. *J & W Investment, Inc.*, 544 F.2d 863, 865 (5th Cir. 1977); *Windham* v. *American Brands, Inc.*, 539 F.2d 1016, 1021-22 (4th Cir. 1976); *Samuel* v. *University of Pittsburgh*, 538 F.2d 991, 996-97 (3rd Cir. 1976). Abuse of discretion occurs when a District Court finding is plainly unsupported by the record. *E.g.*, *Windham* v. *American Brands, Inc.*, *supra*; *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974). Reversal is also proper when the decertification

order was based on application of impermissible criteria (*e.g., Gay* v. *Waiters and Dairy Lunchmen's Union,* 549 F.2d 1330, 1332 (9th Cir. 1977); *Carey* v. *Greyhound Bus Co.,* 500 F.2d 1372, 1379-81 (5th Cir. 1974).

As shown in detail in the Statement of the Case above, Judge Wangelin predicated decertification on a clearly erroneous description of the facts.* Thus, the District Court stated that respondents did not institute discovery to obtain names and addresses of class members until July 1976, when, pursuant to a prior understanding, respondents had sought such information from Punta Gorda promptly upon the Court's approval of the form of notice of pendency of class action in April 1976. (A 176-77, 215-16)** The District Court also stated that the delay between the class action hearing and class certification resulted from substitution of counsel for respondents (Pet. Cert., p. A-7), when Judge Wangelin did not decide that new counsel was required until he certified the class (A 170-72).

The decertification opinion incorrectly attributed all delays in the action to inactivity by respondents (Pet. Cert., A-7, A-8), while totally ignoring (i) Punta Gorda's willful effort to delay production of names and addresses of class members on the pretext that the transfer records were not

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* In this connection, it should be noted that the facts as to what occurred are not in dispute and are clearly set forth in the District Court records. In consequence, the Court of Appeals was in as good a position as the District Court to determine whether the respondents had unduly delayed the litigation. See discussion in *Weeks* v. *Bareco Oil Co.,* 125 F.2d 84, 93 (7th Cir. 1941).

** Coopers did not move to decertify until after respondents sought District Court assistance for their effort to obtain the transfer records. See discussion above, pp. 11-12. It is astonishing that respondents' very effort to obtain names and addresses of class members should have given rise to almost immediate decertification. Such result is especially surprising in light of the four month period taken by the District Court to approve the form of class notice.

within its custody (A 205-206; A 215-216);* (ii) petitioners' continuing efforts to bring about reconsideration of class issues which had already been litigated (*e.g.,* A 94, 178-80); (iii) respondents' repeated efforts to lift the stay on substantive discovery, which efforts were continually rejected at petitioners' request by the District Court in violation of the Eighth Circuit's November 15, 1974 mandate (*e.g.,* A 86, 96, 100, 103, 175, 186-90); (iv) the delay in the lawsuit which resulted from the District Court's allowing over one year to elapse between the filing of the class motion and its determination (A 5, 11); (v) the four months which elapsed between the submission of the proposed notice of pendency of class action to the Court and the Court's approval of such form (A 14, 194); and the fourteen extentions of time (totalling approximately 190 days) obtained by petitioners during the litigation. (Pet. Cert., p. A-20; 550 F.2d at 1112; See A 2-6, 8, 10, 13)

In addition, the District Court utilized improper legal criteria in decertifying the class. First, any delays occuring prior to the appearance of new counsel for respondents should have no bearing on a motion to decertify filed fourteen months after new counsel had appeared. See, *duPont Glore Forgan, Inc.* v. *American Telephone & Telegraph Co.,* 69 F.R.D. 481, 483-84 (S.D.N.Y. 1975). See also the condemnation of the practice of repeatedly asserting identical grounds for decertification in *Kramer* v. *Scientific Control Corp., supra,* 67 F.R.D. at 99. Second, the District Court acted improperly in ruling that respondents had unduly

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* In *Kramer* v. *Scientific Control Corp.,* 67 F.R.D. 98, 101 (E.D. Pa. 1975), *aff'd in part, rev'd in part on other grounds,* 534 F.2d 1085 (3rd Cir. 1976), *cert. denied sub nom. Arthur Andersen & Co.* v. *Kramer,* 429 U.S. 830 (1976) the Court refused to deny class status for undue delay in identifying class members when the delays resulted in large part from defendants' refusal to furnish records voluntarily.

delayed in seeking to discover the identities of class members at a time when the Court had not yet decided whether the relevant information could be determined simply by review of Punta Gorda's transfer records.* Prior to deciding such question, the District Court had no basis for determining how time consuming the effort to identify class members would be. Since Judge Wangelin has now decided that the class notice should be sent, at least in the first instance, only to "initial register[ed] owners of [the relevant] stocks and debentures," respondents' expectation that extensive discovery would not be necessary to identify the recipients of the notice of pendency has proved to be correct (see Appendix A hereto).**

2. The Court of Appeals Properly Reversed the Order Decertifying the Class

The Eighth Circuit properly determined that the District Court decertified solely on the alleged ground that respon-

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* Such question was submitted to the District Court well before resolution of the decertification motion. See discussion above, p. 11. The *Class Action Study, supra,* noted that "a significant factor" with respect to the feasibility of individual notice in class actions was "the relative ease with which the class members were identified from records within the defendant's possession." *Class Action Study,* p. 16.

** Respondents' reasonable basis for believing that the names and addresses required for mailing the notice of pendency were those of the first registered owners after the underwriters is shown by the many cases in which courts have approved such method of notice. *E.g., In re National Student Marketing Litigation* v. *The Barnes Plaintiffs,* 530 F.2d 1012, 1014-15 (D.C.Cir. 1976); *In re Four Seasons Securities Laws Litigation,* 63 F.R.D. 422, 427, 430 (W.D.Okla. 1974), *aff'd,* 525 F.2d 500 (10th Cir. 1975). Compare *In re Penn Central Securities Litigation,* 560 F.2d 1138 (3rd Cir. 1977) and *In re Franklin National Bank Securities Litigation,* 73 F.R.D. 25 (E.D.N.Y. 1976), *appeal pending,* which cases were decided at a date subsequent to the decertification.

dents unduly delayed in prosecuting the litigation. (Pet. Cert., pp. A-7, A-8) Having found that decertification on such ground was an abuse of discretion, the Court of Appeals reversed the decertification order and remanded the case for further proceedings consistent with its opinion. (Pet. Cert., p. A-21; 550 F.2d at 1113) Such procedure is totally unlike that employed in *East Texas Motor Freight System, Inc.* v. *Rodriguez,* 431 U.S. 395 (1977), where the Court of Appeals certified the class in the first instance after plaintiffs had failed to move for class certification before trial and the District Court had dismissed the class action allegations. Here, the effect of the Eighth Circuit's order is only to reestablish the certification which existed prior to the District Court's abuse of discretion in stripping the case of class status.

Furthermore, respondents submit that on the present record decertification for the alternative reasons proposed by Coopers would itself have constituted an abuse of discretion.

Thus, Coopers' argument that respondents were inadequate representatives because they failed to join underwriters and sought to hide an alleged injury to the class because of "divided loyalties" does not withstand scrutiny. (See Coopers' brief, pp. 44-46) Soon after entering the litigation respondents' present counsel informed Judge Wangelin that the interest of the class did not require joinder of underwriters because existing defendants were capable of paying any judgment and appeared to be primary wrongdoers, and because discovery against the underwriters was available without joining them as defendants. (A 183-84). Thus the joining of underwriters would merely have added to the procedural complexity of the litigation, with the prospect of creating additional opportuni-

ties for delay.* By the time of the November 4, 1975 *in camera* conference, respondents' counsel had further refined their analysis and were prepared to state that the limitation period relevant to the underwriters had expired prior to present counsel's appearing in the action.**

No hint of any finding that respondents' present or former counsel*** sought to conceal information from the District Court can be found in the decertification opinion or in any of Judge Wangelin's decisions. There is no truth

* None of the petitioners thought a sound basis for suing the underwriters existed, since they failed to implead them as third party defendants. Consequently, petitioners have no basis for contending that the interest of the class has been adversely affected by respondents' failure to sue any underwriters.

** Since respondents' former counsel had apprised the District Court at the evidentiary hearing that the limitations period had run on any claims under Sections 11 and 12(2) of the 1933 Act (A 166), the only limitations period at issue was that affecting claims under Section 10(b) of the 1934 Act and 17(a) of the 1933 Act. Petitioners conceded below that under *Vanderboom* v. *Sexton*, 422 F.2d 1233, 1236-37 (8th Cir.), *cert denied*, 400 U.S. 852 (1970) the limitations period for Section 10(b) claims would have been the period of two years from the contract of sale set forth in the *Missouri Blue Sky Law*, §409.411(e), Mo.Rev. Statute 1969, as amended. The limitations period for claims under § 17(a) is identical to that under §10(b). *E.g.*, *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, 125-27 (7th Cir. 1972). Since all class members had purchased their Punta Gorda securities at the offering in May 1972, any Section 10(b) claims against the underwriters had apparently expired. Adoption of the federal tolling provision in *Vanderboom* did not preserve claims against the underwriters, because the restatement of Punta Gorda profits which revealed the misleading nature of the Prospectus occurred more than two years prior to present counsel's appearance.

*** Coopers' argument that respondents' original counsel tried to avoid an evidentiary hearing because of conflict of interest problems has absolutely no support in the record. Respondents' former counsel did not believe that Judge Wangelin had ordered an evidentiary hearing to be held but promptly sought direction on this matter from Judge Wangelin when the question was raised by petitioners. (A 98-99, 101-102)

to Coopers' accusations and not a shred of evidence to support them.

Indeed, petitioners' effort to force respondents to sue the underwriters without good cause was itself highly improper. The courts have ruled that an attorney for a class representative is entitled to use his professional judgment in determining the proper defendants to the class action. See *Dorfman* v. *First Boston Corp.*, CCH Fed.Sec.L.Rep. [1973 Transfer Binder] ¶94,155, at p. 94,637 (E.D.Pa. 1973); *Kramer* v. *Scientific Control Corp., supra*, 67 F.R.D. at 100-01 (plaintiffs' failure to sue brokerage firms held not to render plaintiffs inadequate class representatives); *Federman* v. *Empire Fire & Marine Insurance Co.*, 19 F.R. Serv. 2d 480, 484 (S.D.N.Y. 1974) (absent evidence of bad faith, class action plaintiffs have discretion to withdraw action against named defendant).

Coopers' further argument that respondents sought to delay distribution of the notice of pendency is not credible. Respondents complied promptly with the District Court's directions concerning submission of a proposed class notice and did not delay in submitting further comments to the Court with respect to such notice. (A 14, 190, 191, 193, 212) Respondents' major concern with the proposed class notice was its express refusal to define any of the issues which had been certified for class treatment. (A 212-213) Since the notice requirement in Rule 23 is designed to assure that class members not be deprived of substantial rights without due process of law, respondents believed that the notice violated applicable constitutional provisions in failing to provide class members with a description of the class action which would enable them to make intelligent decisions as to whether to opt out, intervene, or remain passive. See, *e.g.*, *Eisen IV*, 417 U.S. at 173-74; *Advisory Committee's Note to Rule 23, supra*, 39 F.R.D. at 107.

Respondents were also concerned that the net effect of the proposed notice would be further protracted litigation on class issues. Continuing litigation on class issues was a problem because Judge Wangelin apparently intended to continue the stay on substantive discovery until all such issues were resolved. In light of the Eighth Circuit's ruling on November 15, 1974, that the District Court should "promptly rule on petitioner's motion [for class determination] and remove its stay order and thereafter permit discovery to proceed on the merits" (A 107-108), respondents were justifiably concerned over prospects for further delay.

Coopers' insistence that the Eighth Circuit should have rejected class certification on grounds other than adequacy of representation is surprising in light of the limitation of the class to persons who purchased at the offering on May 2-3, 1972 and the limitation of documents alleged to be misleading to the Prospectus itself. The relative simplicity of showing predominance of common issues and manageability herein with respect to the class action issues under Section 11 of the Securities Act of 1933 is in sharp contrast with many cases certified for class treatment under the federal securities laws which have involved persons who purchased securities over many months or years, during which time numerous misleading documents were published. *E.g., Blackie* v. *Barrack, supra,* 524 F.2d at 901-08; *Seiden* v. *Nicholson,* 69 F.R.D. 681 (N.D.Ill. 1976). Thus, Coopers' arguments are routinely denied on records such as that in the present action. See, *e.g.,* discussion in *Umbriac* v. *American Snacks, Inc.,* 388 F.Supp. 265, 272-73 (E.D.Pa. 1975). Since class treatment can be limited to specific issues, sub-classes can be created, and class designation is itself conditional, the courts have recognized that they should be especially cautious about refusing class certification for management reasons. *E.g., Green* v. *Wolf Corp.,*

supra, 406 F.2d at 301; *Cusick* v. *N.V. Nederlandsche Combinatie Voor Chemische Industrie,* 317 F.Supp. 1022, 1026 (E.D.Pa. 1970); *State of Illinois* v. *Harper & Row Publishers, Inc.,* 301 F.Supp. 484, 490-91 (N.D.Ill. 1969), *aff'd,* 423 F.2d 487 (7th Cir. 1970), *aff'd,* 400 U.S. 348 (1971). See Moore, Federal Practice, Manual For Complex Litigation, §1.43, p. 49 (1977).*

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* The argument that common issues do not predominate because class members must individually show reliance is irrelevant to respondents' claims under Section 11 and 12(2) of the 1933 Act, which provisions do not require reliance by persons who purchased at the offering. See *e.g.,* Section 11(a) of the 1933 Act, 15 U.S.C. §77k(a). Individual proof of reliance under Section 10(b) is unnecessary where, as here, a cause of action is based on deceptive omissions. *Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 153-54 (1972). Considerable precedent also holds that subjective reliance is unnecessary to prove a cause of action based on affirmative misrepresentation when such misrepresentation inflated the market price of the securities purchased. *E.g., Blackie* v. *Barrack, supra,* 524 F.2d at 907; *Competitive Associates, Inc.* v. *Laventhol, Krekstein, Horwath & Horwath,* 516 F.2d 811, 814 (2d Cir. 1975). Since the question of materiality is "objective" rather than subjective (*TSC Industries, Inc.* v. *Northway, Inc.,* 96 S.Ct. 2126, 2131 (1976)) and causation is shown if a misstatement or omission is material and the misleading document "was an essential link in the accomplishment of the transaction" (*Mills* v. *Electric Auto-Lite Co., supra,* 396 U.S. at 385), causation is also a common issue. Statute of limitations defenses are also appropriate for class treatment. *E.g., Seifer* v. *Topsy's International, Inc.,* 64 F.R.D. 714, 719 (D.Kansas 1974), *appeal dismissed,* 520 F.2d 795 (10th Cir. 1975), *cert. denied,* 423 U.S. 1051 (1976); *Bisgeier* v. *Fotomat Corporation,* 62 F.R.D. 113 (N.D.Ill. 1972).

CONCLUSION

For the reasons given above, the Court should affirm the judgment of the Court of Appeals. If the Court should decide that the Court of Appeals lacked jurisdiction to hear the appeal, the Court should remand the proceedings to the Court of Appeals for consideration of respondents' petition for a writ of mandamus.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 73 C 517 (2)

CECIL LIVESAY, ET UX,

Plaintiffs,

vs.

PUNTA GORDA ISLES, INC., ET AL.,

Defendants.

Memorandum and Order

This matter is before the Court upon various motions concerning discovery and the notice that plaintiffs are required to send in this class action. After considering the arguments of both parties, the Court believes that notice should be sent to the initial register [sic] owners of stocks and debentures who purchased pursuant to the Registration Statement and Prospectus of May 2, 1972. The notice sent to those persons who may be nominees should include a request that the nominees inform the Court of the identity of any beneficial owners.

If through these efforts additional purchasers are identified the Court will order that notice be sent to them also. The Court does not see any need to notify all persons who registered within ninety days of the initial offering and defendants need only to produce the names of the initial registered owners. However, the plaintiffs will

not be required to conduct discovery, as least at this point, to identify all the beneficial owners.

Defendants have moved for a protective order in response to plaintiffs' request to produce certain documents. Defendants object to the fact that plaintiffs' prior counsel inspected many of the same documents and received copies of some nine hundred of those documents. Defendants will not be required to produce again any of those documents. However, plaintiffs may proceed with the remainder of the discovery at this time. The question of reimbursement to defendants for the cost of "double discovery" will be resolved later. Accordingly,

IT IS HEREBY ORDERED that defendants' motion for a protective order be and is DENIED in part and GRANTED to the extent stated above; and

IT IS FURTHER ORDERED that plaintiffs' motion to produce filed August 16, 1976 be and is DENIED in part and GRANTED in part; and

IT IS FURTHER ORDERED that defendants furnish plaintiffs with the names described above within fifteen (15) days of this date; and

IT IS FURTHER ORDERED that plaintiffs send those persons notice of this action as outlined by the Court on April 9, 1976 and as modified above by first class mail, postage pre-paid, within thirty (30) days of defendants production of names.

Dated this 7th day of September, 1977.

/s/ H. KENNETH WANGELIN
United States District Judge

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 73 C 517 (2)

CECIL LIVESAY, and DOROTHY LIVESAY, his wife,

Plaintiffs,

v.

PUNTA GORDA ISLES, INC., ET AL.,

Defendants.

Stay Order

Upon motion of the Court, insofar as the Supreme Court of the United States has granted certiorari in this action, *Coopers & Lybrand* v. *Livesay,* —— U.S. —— 46 U.S.L.W. 3316 (Nos. 76-1836, 76-1837, November 14, 1977),

IT IS HEREBY ORDERED that all pending motions and further proceedings in this action be and are stayed until further order.

/s/ H. KENNETH WANGELIN
United States District Judge

Dated this 7th day of December, 1977.